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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CYNTHIA LOPEZ, Plaintiff and Respondent, v. KENNETH LOPEZ, Defendant and Appellant.	B287383 (Los Angeles County Super. Ct. No. BC669038)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Reversed in part and affirmed in part and remanded with instruction.

Law Offices of Dilip Vithlani and Dilip Vithlani for Defendant and Appellant.

Daniel Boone for Plaintiff and Respondent.

INTRODUCTION

Respondent Cynthia Lopez brought this action against her brother, appellant Kenneth Lopez, asserting claims for defamation, infliction of emotional distress, malicious prosecution, abuse of process, and "[i]njunctive [r]elief." In her operative, amended complaint, respondent alleged appellant had made false accusations of wrongdoing about her to the parties' elderly parents and others, maliciously filed a meritless cross-complaint, and abused the discovery process in this action. The trial court denied appellant's special motion to strike the complaint under Code of Civil Procedure section 425.16[1] (anti-SLAPP motion). Challenging that ruling, appellant argues that his alleged conduct was protected activity, and that respondent's claims are meritless. For the following reasons, we agree the trial court erred in denying the motion as to one of respondent's abuse of process claims based on the allegation that appellant had propounded excessive discovery. We otherwise affirm.

BACKGROUND

A. *The Parties' Lawsuits*

In 2015, respondent filed this action against appellant, asserting claims of defamation and infliction of emotional distress based on appellant's alleged statements to the

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[1] Undesignated statutory references are to the Code of Civil Procedure.

parties' elderly parents and other relatives, respondent's former employer and coworkers, employees of Wells Fargo, and Adult Protective Services (APS). Respondent alleged that appellant had falsely accused her of committing bank fraud and identity theft against him and the parents. Appellant, represented by attorney George Paukert, subsequently filed a cross-complaint, similarly asserting claims of defamation and infliction of emotional distress and alleging that respondent falsely accused him of various transgressions in a report to APS. The parties then engaged in mutual discovery.

In February 2017, after issuing a show cause order and receiving briefing, the trial court ruled that the litigation privilege in Civil Code section 47, subdivision (b) barred the parties' respective claims relating to statements to APS. The court therefore dismissed appellant's cross-complaint in its entirety. As to respondent's complaint, the court held that it "could not rely on statements made to APS . . . ." Respondent then filed a first amended complaint, reasserting her original claims for defamation and emotional distress and adding new claims for malicious prosecution, abuse of process, and "[i]njunctive [r]elief."

Respondent's malicious prosecution claim was based on appellant's dismissed cross-complaint, which she alleged he brought with malice and without probable cause. The abuse of process claims pertained to appellant's alleged conduct

during discovery.[2] Respondent alleged that appellant had propounded excessive discovery requests, including "more than 300 interrogatories, document demands and requests for admission . . . ." She contended that some of appellant's interrogatories were "clearly harassing," as appellant already knew the answers to many of the questions, such as when respondent was born and whether she spoke English. Respondent further alleged that appellant had refused to respond to her discovery requests, failed to attend his own deposition, interfered with third parties' compliance with discovery procedures, and harassed and intimidated witnesses. Finally, in a count of the first amended complaint titled "Injunctive Relief," respondent incorporated by reference all the complaint's allegations and listed several requests for relief.

B. *Appellant's Anti-SLAPP Motion*

In September 2017, after replacing Paukert with different counsel, appellant filed an anti-SLAPP motion. He contended that respondent's action was based entirely on

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[2] We use the term "claim" to refer to particular allegations giving rise to an asserted claim for relief. (See *Baral v. Schnitt* (2016) 1 Cal.5th 376, 382, 395 (*Baral*) ["particular alleged acts giving rise to a claim for relief" constitute a "claim" subject to anti-SLAPP motion; single pleaded count may contain distinct claims], italics omitted.) Thus, while the first amended complaint included only a single count of abuse of process, it asserted multiple claims of that tort based on different alleged acts.

protected activity under section 425.16 and that all respondent's claims were meritless. Regarding respondent's defamation and emotional distress claims, appellant argued his conduct was statutorily privileged under Welfare and Institutions Code section 15634, subdivision (a) and Civil Code section 47, subdivision (c).

As to the malicious prosecution claim, appellant raised the affirmative defense of "advice of counsel," asserting that he relied in good faith on Paukert's advice in bringing his cross-complaint. He submitted his own declaration, stating he was unfamiliar with the legal system and that he had given Paukert "all the information" and truthfully answered any questions Paukert had. He further asserted that he allowed Paukert to bring the cross-complaint in reliance on Paukert's advice that appellant had a valid claim for defamation against respondent, "trusting him, his judgment, his expertise, and his skills." Turning to respondent's abuse of process claims, appellant argued they were barred by the litigation privilege. Finally, on the "[i]njunctive [r]elief" claim, he asserted it was not a valid cause of action.

Respondent filed an opposition to the motion. As relevant here, she contended appellant's alleged statements underlying her claims for defamation and emotional distress involved a private matter, and thus section 425.16 did not protect them. As to the malicious prosecution claim, she argued appellant did not rely on Paukert's advice in good faith. Among other things, respondent pointed to evidence that when appellant wished to oppose one of her discovery

requests, he consulted another attorney and then informed Paukert he was "unwilling to provide" the requested documents and instructed him to oppose the request. She also referenced a letter appellant personally wrote to the trial court, styled as a declaration. In this letter, appellant included legal and other arguments in opposition to respondent's discovery requests and included citation to legal authority. Respondent also provided evidence that on one occasion, after she had agreed to Paukert's request to postpone a scheduled hearing due to a scheduling conflict, appellant insisted that the hearing not be continued. Finally, to establish that appellant brought his cross-complaint with malice, respondent provided the declaration of another sibling, Kevin Lopez, who stated that appellant vowed to get "payback" or words to that effect after learning of respondent's report to APS.

As for the abuse of process claims, respondent argued the litigation privilege did not apply because the alleged conduct underlying them was not communicative. Lastly, on the claim for injunctive relief, she contended it stated an independent cause of action. Appellant later filed a reply, largely reiterating the arguments in his motion.

C. *The Trial Court's Ruling*

The trial court denied appellant's anti-SLAPP motion. As relevant here, it agreed with respondent that the alleged conduct underlying her defamation and emotional distress claims was unprotected and thus not subject to section

425.16. As to the allegations underlying respondent's remaining claims, the court concluded they pertained to protected conduct. However, as to the malicious prosecution claim, the court rejected appellant's contention that it was barred by the defense of advice of counsel. And as to the abuse of process claims, the court stated that the litigation privilege appellant asserted "does not necessarily apply." The court did not discuss respondent's claim for injunctive relief. This appeal followed.

DISCUSSION

"A SLAPP suit -- a strategic lawsuit against public participation -- seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16 -- known as the anti-SLAPP statute -- to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056 (*Rusheen*).) "Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral, supra,* 1 Cal.5th at p. 384.)

Our Supreme Court has described this second step as "a 'summary-judgment-like procedure.'" (*Baral*, *supra*, 1 Cal.5th at p. 384.) "The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.* at pp. 384-385.)

Only a cause of action that satisfies both parts of the anti-SLAPP statute -- that arises from protected speech or petitioning and lacks even minimal merit -- is a SLAPP, subject to being stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "We review a trial court's decision on a special motion to strike de novo." (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 129.)

A. *Defamation and Emotional Distress Claims*

As noted, respondent's defamation and emotional distress claims are based on allegations that appellant made false accusations about respondent to relatives, bank employees, and respondent's former employer and coworkers. The trial court denied appellant's anti-SLAPP motion as to these claims after concluding they did not arise from protected activity. Appellant challenges this conclusion, arguing his alleged statements were statutorily

privileged and therefore constituted protected activity for purposes of the anti-SLAPP statute.

"Section 425.16, subdivision (e), sets forth four categories of conduct to which the anti-SLAPP statute applies. The only way a defendant can make a sufficient threshold showing [of protected activity] is to demonstrate that the conduct by which the plaintiff claims to have been injured falls within one of those four categories." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1130 (*Weinberg*).) "The first two categories of conduct . . . are statements made in, or in connection with an issue under consideration in, an official proceeding." (*Ibid.*) "The third category embraces statements made 'in a place open to the public or a public forum in connection with an issue of public interest.'" (*Ibid.*, quoting § 425.16, subd. (e)(3).) The fourth category includes "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

Appellant does not contend his alleged statements to private individuals about his sister's private conduct fit into one of these four categories. Instead, appellant argues his alleged statements were statutorily privileged under Welfare and Institutions Code section 15634, subdivision (a) and Civil Code section 47, subdivision (c).[3] Whether that

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[3] As relevant here, Welfare and Institutions Code section 15634, subdivision (a) grants "care custodian[s]" immunity from (*Fn. is continued on the next page*.)

assertion is correct is beside the point, however, as conduct that is privileged from suit does not equate with protected activity under the anti-SLAPP statute. (See *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 318, 319 [Civil Code section 425.16's protection is not coextensive with statutory privilege from suit; whether Civil Code section 47 and Business and Professions Code section 6094 barred plaintiff's claims was "not an issue . . . because the burden never shifted to plaintiff to demonstrate a probability of prevailing on his causes of action"].)

Absent a showing that the alleged conduct underlying a claim falls within one of the categories in section 425.16, subdivision (e), a defendant cannot establish that the anti-SLAPP statute protects that conduct. (*Weinberg*, *supra*, 110 Cal.App.4th at p. 1130.) Because appellant has failed to make that showing with respect to respondent's defamation and emotional distress claims, the trial court did not err in denying appellant's anti-SLAPP motion as to those claims. (See *Baral*, *supra*, 1 Cal.5th at p. 384; *Cohen v. Brown*, *supra*, 173 Cal.App.4th at p. 319.)

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civil liability for certain reports of known or suspected elder abuse. Civil Code section 47, subdivision (c) "extends a conditional privilege against defamation to statements made without malice on subjects of mutual interests." (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 287.)

B. *Malicious Prosecution Claim*

In her first amended complaint, respondent included a claim for malicious prosecution based on appellant's cross-complaint, which the trial court had dismissed. Denying appellant's anti-SLAPP motion as to this claim, the court found that although the filing of the cross-complaint was protected activity, respondent had established a probability of success. Appellant challenges this conclusion, arguing respondent's claim is meritless. To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must show: (1) the defendant commenced or directed the commencement of the prior action; (2) the action was terminated in the plaintiff's favor; (3) the action lacked probable cause; and (4) the defendant initiated the action with malice. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 (*Bertero*).)

Invoking the affirmative defense of "advice of counsel," appellant contends respondent cannot establish his cross-complaint lacked probable cause. "Reliance upon the advice of counsel, in good faith and after full disclosure of the facts, customarily establishes probable cause." (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556.) Thus, for this defense to apply, "counsel's advice must be sought in good faith [citation] and '. . . not as a mere cloak to protect one against a suit for malicious prosecution.'" (*Bertero*, *supra*, 13 Cal.3d at p. 54.)

"The burden of proving this affirmative defense is, of course, on the party seeking to benefit by it." (*Bertero*,

supra, 13 Cal.3d at p. 54.) "When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.)

Here, appellant provided a declaration in which he stated he was unfamiliar with the legal system and had given his then-counsel Paukert "all the information" and truthfully answered any questions Paukert had. He further stated he had relied on Paukert's advice that he had a valid claim for defamation against respondent, "trusting him, his judgment, his expertise, and his skills."

Evidence in the record indicates, however, that appellant did not rely on Paukert's advice in good faith. As noted, appellant sought the advice of a different attorney regarding one of respondent's discovery requests, and thereafter informed Paukert he was "unwilling to provide" the requested documents; appellant then instructed Paukert to oppose the request, presumably in accordance with the other attorney's advice. Appellant also submitted his own declaration to the court, in support of his opposition to respondent's discovery requests, consisting largely of argument and including citation to legal authority. Finally, after Paukert had obtained respondent's agreement to

postpone a scheduled hearing due to Paukert's scheduling conflict, appellant insisted the hearing not be continued.

This pattern of bypassing and overruling Paukert on matters within the attorney's professional domain tends to show that rather than "trusting [Paukert's] judgment, his expertise, and his skills," appellant either lacked confidence in Paukert's professional judgment or was prepared to follow only such advice as appellant deemed favorable to him. Together with evidence that appellant brought his action against respondent to get "'payback,'" this evidence suggests appellant did not seek Paukert's advice in good faith. (Cf. *Ross v. Kish* (2006) 145 Cal.App.4th 188, 202 [where defendant had personal relationship with one attorney and business relationship with another, trier of fact could reasonably conclude defendant did not seek opinion of either in good faith].) It thus negates the advice-of-counsel defense for purposes of the anti-SLAPP motion. (See *Bertero*, *supra*, 13 Cal.3d at p. 54 [counsel's advice may not be used "as a mere cloak to protect one against a suit for malicious prosecution"].)

Appellant makes two additional arguments for the first time on appeal. First, he argues respondent cannot establish a favorable termination of the prior action because some of her claims are still pending. Second, relatedly, appellant seeks to rely on the "interim adverse judgment" rule, under which "if an action succeeds after a hearing on the merits," including on dispositive pretrial motions, "that success ordinarily establishes the existence of probable cause . . .

even if the result is overturned on appeal or by later ruling of the trial court." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 771, 776-777.) He maintains the trial court's ruling that respondent could not assert claims based on appellant's alleged report to APS constituted an interim adverse judgment.

Initially, we observe that appellant has forfeited these arguments by failing to raise them before the trial court. (See *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 ["arguments raised for the first time on appeal are generally deemed forfeited"].) Moreover, regardless of forfeiture, appellant's arguments fail, because he misidentifies the relevant action. The filing of a cross-complaint "institute[s] a '. . . separate, simultaneous action'" distinct from the initial complaint. (*Bertero*, *supra*, 13 Cal.3d at p. 51.) The result is ""'two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant.'"" (*Id.* at p. 52.) Appellant's cross-complaint -- the relevant prior action for purposes of respondent's malicious prosecution claim -- was dismissed in its entirety.

That dismissal suffices to establish a favorable termination for respondent. (Cf. *Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 593 [dismissal of original complaint was sufficient to sustain later-added malicious prosecution claim in cross-complaint].) Indeed, the record reveals no success for appellant on his cross-complaint at any stage of the proceeding; accordingly, he cannot benefit from the interim adverse judgment rule. (See *Parrish v. Latham & Watkins*,

supra, 3 Cal.5th at pp. 776-777.) In short, appellant has failed to show error in the trial court's denial of his anti-SLAPP motion as to respondent's malicious prosecution claim.

C. *Abuse of Process Claims*

Respondent's first amended complaint included claims for abuse of process based on several alleged acts by appellant during the litigation, including: propounding excessive discovery, refusing to respond to respondent's discovery requests, failing to attend his own deposition, interfering with third parties' compliance with discovery requests, and harassing and intimidating witnesses.[4] The trial court denied appellant's anti-SLAPP motion as to these claims as well. Here, too, the court found the alleged conduct underlying the claims was protected activity, but that respondent had established a probability of success. In

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[4] "'[T]he essence of the tort [of abuse of process] [is] . . . misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [Citation.] To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." (*Rusheen*, *supra*, 37 Cal.4th at p. 1057.)

so concluding, the trial court rejected appellant's argument that the litigation privilege barred respondent's claims.[5]

On appeal, appellant renews his argument based on the litigation privilege. The litigation privilege, codified in Civil Code section 47, subdivision (b), protects "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) As explained below, we agree the privilege bars one of respondent's claims for abuse of process -- the claim based on appellant's excessive discovery.[6] In her brief on appeal, respondent lists only the alleged acts underlying her other abuse of process claims -- appellant's alleged dilatory practices and intimidation of witnesses. She then argues

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[5] The trial court's reasoning in rejecting appellant's argument based on the litigation privilege is not apparent from its ruling. The court's order stated, "for the reasons discussed above, the litigation privilege does not necessarily apply," but it is unclear what reasons the court was referencing.

[6] Whether the litigation privilege is a substantive defense that a plaintiff must overcome or an affirmative defense that a defendant has the burden to establish is a disputed matter in the Courts of Appeal. (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 683 [discussing conflicting case law].) We need not resolve this question, because even assuming appellant bears the burden of proof, we conclude the privilege applies to his discovery requests as a matter of law.

those acts are non-communicative and thus fall outside the scope of the privilege. She does not argue that his discovery requests were not communications or that they otherwise fell outside the privilege's protection.

Discovery requests are communications made in a judicial proceeding by litigants. (See, e.g., *Twyford v. Twyford* (1976) 63 Cal.App.3d 916, 924 [privilege applies to request for admission]; *Younger v. Solomon* (1974) 38 Cal.App.3d 289, 301 [privilege applies to interrogatory]; *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 82-83, 85 (*Thornton*) [privilege applies to attorney's questions at deposition].) As to the "objects of the litigation" and "logical relation" requirements, these are related elements meant to ensure that the communication is not "extraneous to the action." (*Silberg, supra,* 50 Cal.3d 205 at pp. 219-220; see also *Sacramento Brewing Co. v. Desmond, Miller & Desmond* (1999) 75 Cal.App.4th 1082, 1088 (*Sacramento Brewing*) [logical-relation requirement "merely serves to establish that the [challenged] statements were made *in* the proceeding from a functional standpoint"].)

"""California courts have consistently applied a liberal standard for establishing a relationship between publications made by parties and judicial proceedings."""" (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 813, fn. 10, quoting *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 772 (*Wilburn*).) "'[R]elevance, materiality, or pertinenc[e] in their technical sense'" are not required. (*Sacramento*

Brewing, supra, 75 Cal.App.4th at p. 1089, quoting *Thornton, supra*, 245 Cal.App.2d at p. 90.) Instead, "doubts are to be resolved in favor of relevancy and pertinency," and "the matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that there can be no reasonable doubt of its impropriety.'" (*Wilburn, supra*, at p. 772, quoting *Thornton*, at p. 93.)

Here, respondent does not contend appellant's discovery requests raised matters wholly unrelated to the litigation; nor does the record reveal such matters. Before the trial court, respondent complained of the volume of appellant's discovery requests and asserted that some of the interrogatories, asking such questions as when respondent was born and whether she spoke English, were "clearly harassing" because appellant already knew the answers. However, neither the volume of the requested information nor the fact that appellant may already have known some of it suggests the information was completely irrelevant to the litigation. Indeed, some of the specific questions respondent challenges may be pertinent in prosecuting and defending against defamation claims. For instance, respondent's age could have been, and may still be, relevant in litigating potential damages for her action. Resolving all doubts in favor of relevancy, we cannot say appellant's discovery requests had no logical relation to the litigation or were not calculated to achieve its objects. (See *Silberg*, *supra*, 50 Cal.3d at pp. 219-220; *Wilburn*, *supra*, 189 Cal.App.3d at

p. 772.) Accordingly, we conclude the litigation privilege barred respondent's claim based on appellant's excessive discovery and thus the trial court erred in denying appellant's anti-SLAPP motion as to that claim.

As for respondent's abuse of process claims based on appellant's alleged dilatory conduct and witness intimidation, appellant offers no reasoned argument that the relevant conduct falls under the litigation privilege. Instead, in his brief on appeal, he makes the bare assertion that "all of the conduct attributed to [appellant] involved communications that were made during the course of and directly related to judicial proceedings." He has therefore forfeited any challenge to respondent's relevant claims.[7] (*Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 [contentions unsupported by reasoned argument and citation to authority are forfeited].)

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[7] We question whether some of the alleged conduct underlying respondent's claims constitutes "process" for purposes of an abuse of process claim. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1057 ["abuse of process" involves "'an act done in the name of the court and under its authority'"].) We do not decide the issue, however, as appellant has forfeited it by failing to raise it either before the trial court or on appeal. (See *Perez v. Grajales*, *supra*, 169 Cal.App.4th at pp. 591-592; *W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 149, fn. 7 [issues not raised in the appellant's opening brief are deemed abandoned].)

D. *Claim for Injunctive Relief*

In her first amended complaint, respondent included a claim for "[i]njunctive [r]elief," in which she simply incorporated all the allegations of the complaint by reference and listed several requests for relief. Although appellant's anti-SLAPP motion encompassed respondent's entire complaint, the trial court did not specifically address this claim for injunctive relief in denying the motion. Appellant challenges the denial of his anti-SLAPP motion as to this claim, arguing that injunctive relief is not a cognizable cause of action.

Appellant is correct that "a request for injunctive relief is not a cause of action." (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984, quoting *Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168.) As respondent concedes, her request for injunctive relief may be understood more properly as a prayer for relief. So construed, we need not consider the applicability of the anti-SLAPP statute to this portion of respondent's complaint.

DISPOSITION

The judgment is affirmed in part and reversed in part, and the matter is remanded to the trial court with instructions to strike respondent's allegations of excessive discovery requests underlying one of her claims for abuse of process. Respondent is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.